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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

PHILLIPS PETROLEUM COMPANY,
Petitioner
v.
GARY JOHNSON, AREA MANAGER,
DALLAS AREA COMPLIANCE OFFICE,
MINERALS MANAGEMENT SERVICE, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE LOUISIANA LAND AND EXPLORATION COMPANY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether 28 U.S.C. § 2415(a), which imposes a six-year statute of limitations upon "any action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract," applies to a claim asserted by the federal government for royalties under a mineral lease.

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BRIEF OF THE LOUISIANA LAND AND EXPLORATION COMPANY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Louisiana Land and Exploration Company ("LL&E"), as amicus curiae, supports Phillips Petroleum Company's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

The statute of limitations imposed by 28 U.S.C. § 2415 (a)[1] bars "every action for money damages brought by

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[1] 28 U.S.C. § 2415(a) provides in pertinent part:

> Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or

the United States or any officer or agency thereof which is founded upon any contract . . . unless the complaint is filed within six years." The Fifth Circuit, relying exclusively upon *Bowen v. Massachusetts*, 487 U.S. 879 (1988), held that the statute does not bar a claim by the United States initially asserted in an administrative action as opposed to in a judicial action and that the statute does not bar a claim by the United States to enforce a contract for the payment of money to the United States. In such instances, the Fifth Circuit concluded that the government seeks "monies due under a contract with the government," not "compensatory relief" or "money damages."

INTEREST OF AMICUS CURIAE

LL&E is the lessee of oil and gas leases granted by the United States. LL&E believes that the United States will make claims for royalty against it which, but for the decision below, would be barred by § 2415(a).

REASONS FOR GRANTING THE PETITION

The Fifth Circuit, having omitted any discussion of the statute of limitations in its original opinion, addressed this issue in an unpublished decision on rehearing. That decision did not discuss the contrary opinions from other circuits.[2] The opinion of the Fifth Circuit will neverthe-

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agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later. . . .

[2] *3M Company v. Brouner*, 17 F.3d 1453 (D.C. Cir. 1994); *Phillips Petroleum Co. v. Lujan*, 4 F.3d 858 (10th Cir. 1993); *Mesa Operating Ltd. Partnership v. Dep't of Interior*, 17 F.3d 1288 (10th Cir. 1994); *see also, infra*, note 7 and accompanying text.

less be binding on subsequent Fifth Circuit panels.[3] The government is a party to all suits in which the limitation could be raised, knows of the decision, and can be expected to rely on it in all contexts in which it is expedient to do so. If the Fifth Circuit's opinion stands, the government, in any instance in which it has the choice between bringing an action in an administrative proceeding or in a court can circumvent § 2415(a) by bringing the agency action. Even in the case of actions that only can be brought in the courts, the government can escape the bar whenever its contract obligates the defendant to pay money, rather than render some other performance.

The United States historically has enjoyed two basic advantages over private litigants: (1) as a defendant, it has enjoyed sovereign immunity and (2) as a plaintiff, it has enjoyed immunity from prescription. Because the government frequently engages in commercial transactions and because Congress has recognized that, in connection with such transactions, the government should be placed on equal footing with private litigants,[4] the Congress has

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[3] *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 355 (5th Cir. 1993), *reh'g, en banc, granted*, 12 F.3d 426 (1994), *different results reached on reh'g, en banc*, 44 F.3d 334 (5th Cir. 1995); *United States v. Don B. Hart Equity Pure Trust*, 818 F.2d 1246, 1250 (5th Cir. 1987); 5th Cir. R. 47.5.3.

[4] *Crown Coat Front Co., Inc. v. United States*, 386 U.S. 503, 521 n.14 (1967) (With respect to 28 U.S.C. § 2401, which limited the government's sovereign immunity, the Court stated that Congress' intent to equalize the positions of the government and private litigants was evident); *United States v. Cardinal*, 452 F.Supp. 542, 544 (D. Vt. 1978) (With respect to § 2415, the court held that the Senate Report No. 1328, 89th Cong., 2d Sess., reprinted in [1966] U.S. Code Cong. & Admin. News, "iterates and reiterates that the purpose of the law is to increase fairness to private litigants dealing with the Government." *Id.* The court further noted that, as set out in the Senate Report, the Attorney General outlined six reasons for adopting § 2415, including "to 'make the position of the Government more nearly equal to that of private litigants'" . . . . *Id.* at 545); Letter dated February 14, 1966, from the Assist-

passed repeated acts creating exceptions to these rules. Thus, when Congress enacts such legislation, courts should construe it so as to give effect to that purpose. *See Crown Coat Front Co., Inc. v. United States,* 386 U.S. 503, 521-22 (1967). It is ironic that *Bowen v. Massachusetts,* which liberally construed an act creating an additional exception to the doctrine of sovereign immunity, should now be used as the basis for eviscerating § 2415(a) insofar as it applies to untimely claims to enforce contracts for the payment of money. Such claims, if not made timely, are the very claims Congress and most persons of common understanding would deem to be barred by §2415(a).

I. THE HOLDING THAT THE GOVERNMENT'S REMEDY OF PROCEEDING BEFORE THE AGENCY IS NOT BARRED NO MATTER HOW UNTIMELY THE CLAIM

"It would be singular if the one remedy should be barred and the other left unrestrained." *Adams v. Woods,* 6 U.S. 336, 341 (1805) (Marshall, C.J.).

The Fifth Circuit's interpretation of § 2415(a) is contrary to the rule that this Court established in 1805. In *Adams v. Woods,* the United States sought to circumvent a statute of limitations by bringing an "action for debt" in a civil proceeding in the district court rather than by filing an indictment or information in a criminal proceeding. The statute of limitations before the Court provided that no person shall be:

> prosecuted, tried or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, *unless the indictment or information for the same shall be found or instituted within two*

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ant Secretary of the Interior to the Director of the Bureau of the Budget with respect to the proposal of § 2415 ("This legislation . . . equalizes the position of the Government and the private litigant when each is asserting claims against the other.").

> *years from the time of committing the offence, or incurring the fine or forfeiture aforesaid.*

The United States noted that the statute's subordinate clause, beginning with "unless" (italicized above), referred only to an *indictment* and an *information*, not also to a civil suit. Hence, the United States argued that in a civil action, as opposed to in a criminal action brought by indictment or information, the United States could proceed without regard to the bar. Justice Marshall, however, concluded that the statute of limitations did not apply "to any particular mode of proceeding, but generally to any prosecution, trial, or punishment for the offence." *Id* at 340-341. He held that a fine could be collected by action for debt as well as by information and that:

> to declare that the information was barred while the action of debt was left without limitation, would be to attribute a capriciousness on this subject to the legislature, which could not be accounted for. . . .

Id. at 341.

In the present action, the government's position again focused on the "subordinate clause" of a statute of limitations. The pertinent clause of § 2415(a), also beginning with "unless," refers to a "complaint" and not also to an order giving rise to an administrative action. Contrary to *Adams v. Woods*, however, the Fifth Circuit held that the statute of limitations applied only to actions brought by complaint and that the United States could proceed in the agency forum without regard to the bar—notwithstanding that § 2415(a) does not "apply to any particular mode of proceeding" but applies to "every action" for money damages.

The Fifth Circuit's opinion in the present action is directly contrary to *3M Company v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), which followed *Adams v. Woods* and held that an untimely action to collect a penalty,

whether brought before an agency or a court, is equally barred by the applicable statute of limitations:

> Given the reasons why we have statutes of limitations, there is no discernible rationale for applying § 2462 when the penalty action or proceeding is brought in a court, but not when it is brought in an administrative agency.

Id. at 1456. The court, composed of Judges Buckley and Randolph and Judge, now Justice, Ginsburg, reasoned that:

> The concern that after the passage of time "evidence has been lost, memories have faded, and witnesses have disappeared" pertains equally to factfinding by a court and factfinding by an agency . . . . From the potential defendant's point of view, lengthy delays upset "settled expectations" to the same extent in either case.

Id. at 1457. The court, like this Court in *Adams*, refused to let the claim have "a perpetuity of existence" because to do so would have been "utterly repugnant to the genius of our laws." *Id.*; *accord Wilson v. Garcia*, 471 U.S. 261, 271 (1985); *Pendergast v. United States*, 317 U.S. 412, 418 (1943).

In a claim like the one he asserts here, the Secretary of the Interior represents the United States in its proprietary capacity. He has ultimate authority to make any decision committed to the Interior Department. He sits as judge in his own cause, subject only to judicial review in which courts apply deferential standards. Congress hardly would have intended that he and other federal officials be permitted to control the application of the statute of limitations by the choice of the initial forum.[5]

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[5] In the present action, neither Phillips' lease from the government nor any law required the Secretary of the Interior to bring administrative proceedings against Phillips before filing suit. The Secretary chose the administrative action.

To use the words of Chief Justice Marshall, that would indeed be "to attribute a capriciousness on this subject to the legislature." *Adams v. Woods*, 6 U.S. at 341. Yet, that is what the Fifth Circuit has done here.

II. THE HOLDING THAT THE GOVERNMENT IS NOT BARRED FROM ENFORCING A CONTRACT WHERE THE OBLIGATION IS TO PAY MONEY

The Fifth Circuit's holding that the statute is not applicable when the government "seeks money due under a contract" because the relief sought would not be "compensatory damages" is based exclusively on *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). The Fifth Circuit reached a result which, as explained below, neither the majority in *Bowen* nor the dissent (Justices Scalia and Kennedy and the Chief Justice) would have reached.

In *Bowen*, Massachusetts sought judicial review of a final order of the Secretary of Health and Human Services, which declined to fund certain procedures Massachusetts had adopted under the Medicaid program. The state sought declaratory and injunctive relief, including an injunction requiring the Secretary of Health and Human Services to pay to the state sums due under the Medicaid Act. With respect to suits in the district courts other than those for "money damages," Congress had waived sovereign immunity by the Administrative Procedure Act. Suits for "money damages," by contrast, could be brought only in the Claims Court.

This Court held that Massachusetts' action properly had been brought in the district court and that the relief sought was not "money damages." This Court determined that "money damages" did not have "any meaning other than the ordinary understanding of the term as used in the common law for centuries." *Id.* at 897. While the court recognized that "in many instances an award of money is an award of damages," it held that occasionally a money award is also a specie remedy. *Id.* at 895.

The Court also recognized that, in appropriate circumstances, a court may issue an injunction requiring the payment of money, and concluded that, when Massachusetts sought to require the federal government to pay over the money necessary to fund a certain category of Medicaid benefits, the state was not seeking "money damages." *Id.* at 910.

However, the Court in *Bowen* did not have occasion to decide, and certainly did not hold as the Fifth Circuit has done in *Phillips,* that, when the United States, as plaintiff, sues on a contract under which the other party obligated itself to pay money, the United States is entitled to circumvent the statute of limitations by characterizing the claim as a suit for relief other than "money damages." To have done so would have elevated form and procedure over substance and would have been contrary to "the ordinary understanding of the term [money damages] as used in the common law for centuries." *Id.* at 897.

The dissent (joined on this point by Justice White, concurring) believed that Massachusetts' suit was a suit for money damages. *Id.* at 913 (Scalia, J., dissenting). Justice Scalia recognized that, except for the means by which the judgment can be enforced, a money judgment in a case in which the obligation of the defendant is to pay money gives essentially the same relief as specific performance or injunction. Justice Scalia also recognized the common law rule, settled for centuries, that in such a case the plaintiff ordinarily is required to seek "money damages," not specific performance or other equitable relief:

> As the Court recognizes, however, the terms "damages" and "specific relief" have been "used in the common law for centuries," . . . and have meanings well established by tradition. Part of that tradition was that a suit seeking to recover a past due sum of money that does no more than compensate a plain-

> tiff's loss is a suit for damages, not specific relief; a successful plaintiff thus obtains not a decree of specific performance requiring the defendant to pay the sum due on threat of punishment for contempt, but rather a money judgment permitting the plaintiff to order "the sheriff to seize and sell so much of the defendant's property as was required to pay the plaintiff." Farnsworth, Legal Remedies for Breach of Contract, 70 Colum.L.Rev. 1145, 1152 (1970).

Id. at 918 (Scalia, J., dissenting); *accord* John Norton Pomeroy, *Specific Performance of Contracts*, § 47 (3d ed. 1926):

> It is the fundamental principle regulating the exercise of this equitable jurisdiction, that whenever the legal remedy of damages is sufficient, equity will not interfere, and the specific performance will be refused; *and this is always the case when the contract is satisfied by a payment of money.* (emphasis added).

The majority in *Bowen*, by giving a liberal interpretation to a statute waiving sovereign immunity and by holding that the statute "intended to authorize equitable suits for specific monetary relief,"[6] almost certainly did not intend to overthrow these venerable rules of law so as to allow a party, in the absence of special circumstances requiring equitable relief, to enforce a contract for the payment of money by any means except a claim for money damages.

The decision of the Fifth Circuit did, however, overthrow these rules. As Justice Scalia said the majority had done in *Bowen*, the Fifth Circuit disregarded the traditional rule that, where a party seeks money, particularly "monies due under a contract," the party is deemed to seek "money damages." The Fifth Circuit held that "money damages" normally refers to a sum of money used as compensatory relief, *i.e.*, relief which a

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[6] *Id.* at 899-900.

party receives in lieu of the performance to which the party was entitled. It held that when the government seeks "monies due under a contract with the government," it does not seek "compensatory relief" and so does not seek "money damages." Thus, the Fifth Circuit, standing the law on its head, limited the application of the statute of limitations to those instances where the government seeks "damages" because the defendant did not perform an obligation other than one to pay money.

Justice Scalia did not foresee explicitly that the majority's reasoning in *Bowen*, as he interpreted it, would lead to this result, but he did foresee other consequences:

> Today's decision is a potential cornucopia of waste. Since its reasoning cannot possibly be followed where it leads, the jurisdiction of the Claims Court has been thrown into chaos. On the other hand, perhaps this is the opinion's greatest strength. Since it cannot possibly be followed where it leads, the lower courts may have the sense to conclude that it leads nowhere, and to limit it to the single type of suit before us.

Bowen, 487 U.S. at 930 (Scalia, J., dissenting).

Insofar as Justice Scalia was sanguine, he was wrong. In *Phillips*, the Fifth Circuit followed Justice Scalia's understanding of Bowen's reasoning to reach a result which overthrew principles of law settled for centuries and, in the process, eviscerated a fundamental statute of limitations barring stale claims by the government. If *Phillips* is correct, § 2415(a) can be avoided in otherwise untimely suits to recover student loans, farm loans, rent or royalty due on surface or mineral leases, and money due under any of the host of contracts where the government claims to be owed money, not as a substitute performance, but as the performance provided for in the contract.[7]

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[7] The Fifth Circuit's opinion contradicts a long line of federal jurisprudence holding that § 2415(a) controls the government's

Finally, *Phillips* is the obverse of *Amoco Production Company v. Hodel*, 815 F.2d 352 (5th Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988), where the Secretary of the Interior argued, and the Fifth Circuit held, that a suit by Amoco for judicial review of a decision of the Interior Department declining to refund an overpayment of royalty was a suit for "money damages," and so could not be brought in the Claims Court. If Amoco's suit for the recovery of an overpayment of royalty on Outer Continental Shelf leases constituted a claim for "money damages," the Secretary's claim for an underpayment of royalty similarly constituted a claim for "money damages," and so is barred by the statute of limitations. The Fifth Circuit and the Secretary cannot have been right both in *Phillips* and *Amoco*.

The Fifth Circuit, relying solely on *Bowen*, reached a result that neither the majority nor the dissent in *Bowen* supports. The Fifth Circuit disregarded a tradition of centuries with respect to the meaning of "a claim for

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right to bring action to enforce contracts for the payment of money in a variety of contexts. *See, e.g., United States v. Alvarado*, 5 F.3d 1425, 1428 (11th Cir. 1993) (The court held that § 2415(a) barred an action by the government, on behalf of the Farmer's Home Administration, to recover on a defaulted government loan: "We conclude, as has every court that has addressed this issue, that a suit to recover from the debtor amounts owed on a promissory note is an action for money damages founded upon a contract."); *Federal Deposit Insurance Corp. v. Petersen*, 770 F.2d 141, 143 (10th Cir. 1985) (The court held that § 2415(a) barred the FDIC's action to enforce a loan guarantee contract.); *United States v. Vanornum*, 912 F.2d 1023, 1025 (8th Cir. 1990) (The court held that § 2415(a) governed an action by the government through the Small Business Administration, to enforce guarantees on defaulted loans under the SBA's loan guarantee program.); *United States v. Milam*, 855 F.2d 739, 740 (11th Cir. 1988) (The court applied § 2415(a) to the government's action to collect on three federally insured student loans.); *Federal Deposit Insurance Corp. v. Barrera*, 595 F.Supp. 894, 898-90 (D.P.R. 1984) (The court held that § 2415(a) barred the government's action to enforce guarantees on promissory notes.).

money damages." "[T]he line between damages and specific relief must surely be drawn on the basis of the substance of the claim, and not its mere form." *Bowen*, 487 U.S. at 915 (Scalia, J., dissenting). Yet, the Fifth Circuit elevated form and procedure over substance. It eviscerated the pertinent statute of limitations. The decision potentially will control the result in any untimely dispute in which the government claims that it is owed money under a contract or in which the government can choose to proceed by administrative proceeding rather than by suit in the district court. The Fifth Circuit's decision calls into question the correctness of every federal decision holding that § 2415(a) applies to government actions to enforce contracts where the other party's obligation is to pay money.

If the reasoning of *Bowen* leads to *Phillips*, *Bowen* has indeed thrown the law into chaos as forewarned by Justice Scalia.

CONCLUSION

This Court should grant Phillips' petition for a writ of certiorari.

Respectfully submitted,

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